No. 85-224 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF RIVERSIDE, ET AL., PETITIONERS

v.

SANTOS RIVERA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether, in a case that results solely in an award of money damages, a "reasonable attorney's fee" under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, should be reasonably related to the amount of damages received by the plaintiff.

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INTEREST OF THE UNITED STATES

This case presents important recurring questions concerning the determination of the amount of attorneys' fees that may properly be awarded to a prevailing party under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988. It is arguable that the United States itself may, in certain circumstances, be held liable for attorneys' fees under 42 U.S.C. 1988, by virtue of the Equal Access to Justice

Act, 28 U.S.C. 2412(b), which renders the government liable for attorneys' fees "to the same extent that any other party would be liable under the * * * terms of any statute which specifically provides for such an award." Accordingly, the United States has a substantial interest in ensuring that fee awards are not excessive or contrary to Congress's intent. On the other hand, because private enforcement of the civil rights laws provides an important supplement to federal enforcement, the United States is vitally concerned that "fully compensatory fee[s]" (*Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983)) be awarded in appropriate cases. The government's interest in striking the proper balance is not limited to cases arising under 42 U.S.C. 1988, because the Court's decision undoubtedly will affect the computation of attorneys' fees under other fee-shifting statutes as well (*Hensley*, 461 U.S. at 433 n.7).

STATUTE INVOLVED

42 U.S.C. 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

1. On August 1, 1975, City of Riverside police officers, using tear gas and physical force, broke up a party at a private residence and made several arrests (J.A. 177, 187-188). Among those arrested and

prosecuted were four of the respondents in this case, against whom charges were ultimately dismissed for lack of probable cause (*ibid.*). Respondents—eight Mexican-Americans involved in the August 1975 incident—brought this action on June 4, 1976, against petitioner City of Riverside, its chief of police, and 30 police officers (five of whom are petitioners here), alleging various constitutional and federal statutory civil rights violations and several pendent state common law torts (J.A. 177, 182 n.1).[1] By way of relief, respondents sought a declaratory judgment (Complaint 13), a preliminary and permanent injunction preventing "discriminatory harassment" and "discriminatory enforcement of the law" (*ibid.*), compensatory and punitive damages (*id.* at 14), and an award of attorneys' fees and costs (*ibid.*). However, respondents did not press their claim for injunctive relief (J.A. 214).

2. On January 10, 1978, the district court, on motion for summary judgment, dismissed respondents' claims against 17 of the police officers named as defendants in the complaint (J.A. 7-13). On September 16, 1980, following four years of discovery and two settlement conferences, the case went to trial before a jury over a period of nine days (*id.* at 177, 188). After seven days of deliberations, the jury returned verdicts in respondents' favor on several of the civil

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[1] Specifically, respondents alleged that the defendants had violated the First, Fourth, and Fourteenth Amendments, and 42 U.S.C. 1981, 1983, 1985(3), and 1986. Respondents also set forth various state law claims based on allegations of conspiracy, emotional distress, assault and battery, property damage, breaking and entering, malicious prosecution, defamation, false arrest, false imprisonment, lost wages, and negligence (J.A. 182 n.1).

rights and common law claims against the City and in favor of five of the individual police officers remaining in the suit on all claims (*id.* at 166-171). Specifically, the jury found that the City and three of the officers had violated 42 U.S.C. 1983 in 11 instances and awarded a total of $13,300 in compensatory and punitive damages for those civil rights violations (J.A. 166-171).[2] In addition. the jury found that the City and five of the officers (including the three mentioned above) had committed 26 acts of common law negligence, or false arrest and false imprisonment, and awarded a total of $20,050 in compensatory (and, in only one instance, punitive) damages (*ibid.*). Thus, the jury verdicts against the City and five individual police officers amounted to a combined total of $33,350 in damages (*ibid.*; *id.* at 177).

3. On December 1, 1980, respondents moved for an award of attorneys' fees and costs under 42 U.S.C. 1988 (J.A. 14-64). Respondents objected on numerous grounds (*id.* at 65-123), various supplemental pleadings were filed (*id.* at 124-165), and the matter came on for hearing in the district court on January 19, 1981 (*id.* at 166, 173). On April 7, 1981, the court entered its decision on the attorneys' fees matter (*id.* at 173-175). Respondents had sought compensation for their attorneys at a rate of $125 per hour for 1,946.75 hours, and for their law clerks at a rate of $25 per hours for 84.50 hours, for a total of $245,456.25—all of which the district court found to be reasonable (*id.* at 174-175).[3] Accordingly, the

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[2] Respondents' Section 1983 claims were the only federal claims submitted to the jury. Br. in Opp. 2 n.1.

[3] Respondents had also sought reimbursement for various out-of-pocket costs (J.A. 62-64) and a multiplier of the regular attorneys' fees by a factor of two, in order to "encourage

district court entered an award of $245,456.25 for respondents on their attorneys' fees claim (*id.* at 175).

Petitioners appealed only the attorneys' fees award, and the court of appeals upheld the award in its entirety (J.A. 176-183; 679 F.2d 795). Petitioners then sought review in this Court, which, on May 31, 1983, granted certiorari, vacated the judgment below, and remanded the case for further consideration in light of *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) (J.A. 184; 461 U.S. 952).

On remand, the district court, on July 26, 1984, issued a new opinion readopting the original attorneys' fees award in its entirety (J.A. 185-192). Citing this Court's decision in *Hensley*, however, the district court this time stated that the number of hours claimed by respondents' counsel and the amount of the fee award were reasonable in view of the level of success achieved by the litigation (*id.* at 192). Petitioners again appealed, and the court of appeals again upheld the award of attorneys' fees, stating without elaboration that "the district court correctly reconsidered the case in light of *Hensley*" and "the fee award is reasonable" (*id.* at 194). On August 28, 1985, Justice Rehnquist, acting as Circuit Justice, issued an order granting petitioners' application for a stay of the court of appeals' mandate (No. A-122).

INTRODUCTION AND SUMMARY OF ARGUMENT

The computation of a "reasonable" attorneys' fee under 42 U.S.C. 1988 must serve two difficult and sometimes conflicting masters in each of the myriad

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other attorneys to represent low income plaintiffs in important civil rights cases on a contingent fee basis" (*id.* at 43). The district court rejected these requests (*id.* at 175, 182 n.3).

cases for which a fee award can be made. On the one hand, the fee award must be adequate to ensure that plaintiffs with meritorious civil rights claims will be able to attract competent counsel; on the other hand, the award must not be so generous as to unjustly enrich a plaintiff's attorney at the defendant's expense. In computing a fee award, therefore, the amount recovered by the plaintiff in damages is an important consideration for the courts to assess, but it is not the only one. In cases involving injunctive relief, or an award of damages that has the same effect as an injunction, or an award of nominal damages, strict use of the amount of damages recovered by a plaintiff to cap an attorneys' fee award might not sufficiently compensate a lawyer and therefore might not be adequate to ensure that plaintiffs can obtain adequate representation. However, in other cases, such as this one, which can fairly be characterized as a suit brought essentially for the monetary benefit of the individual plaintiffs involved, an award of attorneys' fees that exceeds or approximates the damages recovery would overcompensate plaintiffs' attorneys and thereby disserve Congress's other equally-important goal. We submit that in the latter category of cases a fee that exceeds or approximates the damages obtained by the plaintiff is presumptively unreasonable and that the lower courts plainly erred in upholding the award in this case.

1. In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), and *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), this Court ruled that the product of the number of hours reasonably expended on a case and a reasonable hourly rate is a presumptively reasonable attorneys' fee under Section 1988. The Court recognized, however, that this figure would have to be adjusted in some cases, and this case is one such exception. Be-

cause few reasonable plaintiffs would be willing to pay their counsel more than they hope to recover in damages, the lodestar does not provide a reliable guide to the calculation of a reasonable attorneys' fee where it exceeds or approximates the plaintiff's damages recovery. In those circumstances, the lodestar produces a presumptively *unreasonable* fee that should be adjusted downward. A downward adjustment is also necessary to ensure that civil rights plaintiffs, not their attorneys, will be the primary beneficiaries of Section 1988.

2. The lower courts erred by failing to consider whether the prevailing contingent fee rate would provide the appropriate method of calculating the fee award. Given the nature of the constitutional and common law tort claims that respondents presented, an attorney who handles personal injury claims may well provide the type of "similar services" (*Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), slip op. 8 n.11) in the private bar that can be used as a comparison, and the prevailing contingent fee rate may well represent the appropriate measure of compensation. A contingent fee approach would not prevent plaintiffs with meritorious claims from obtaining counsel where, as here, the potential damages recovery is sufficiently large to provide adequate compensation. This approach also ensures that attorneys handling fee claims would not be more handsomely compensated than other lawyers in the private sector, a result that Congress did not intend.

3. Nothing in the opinions below suggests that there is any reason for treating this case in a different fashion. More than half of the original defendants were dismissed from this suit on summary judgment or were found not liable by the jury; the plain-

tiffs received only an award of damages; no injunction was entered; and neither the City nor the police department was forced to modify a longstanding policy or custom. In sum, nothing in the opinions below suggests that this suit constitutes anything more significant than what it appears to be on the surface: a constitutional and state law tort suit seeking damages as a result of a single incident.

ARGUMENT

A REASONABLE ATTORNEYS' FEE IN AN ACTION LIMITED SOLELY TO MONETARY RELIEF SHOULD TAKE INTO ACCOUNT THE PREVAILING CONTINGENT FEE RATE FOR PERSONAL INJURY CLAIMS

A. By Relying Exclusively On The "Lodestar" Approach To Compute An Award Of Attorneys' Fees In This Case, The Lower Courts Reached The Anomalous Result That Respondents' Counsel Would Be More Highly Compensated Than Respondents Themselves

1. The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, authorizes the courts to award a prevailing plaintiff "a reasonable attorney's fee" in suits brought under certain federal civil rights laws. In that Act, Congress modified the traditional "American Rule," under which each party to civil litigation must generally bear its own legal fees (see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)), to ensure that "civil rights plaintiffs obtain 'effective access to the judicial process.'" *Marek* v. *Chesny*, No. 83-1437 (June 27, 1985), slip op. 8 (citations omitted). To provide the courts with guidance for computing a "reasonable" attorneys' fee that is faithful to that principle, but avoids unjustly enriching plaintiffs' attorneys at a defendant's expense, Congress identified the touchstone for calculat-

ing a "reasonable" fee in the following terms: "fees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. 94-1011, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as *Senate Report*]; see also H.R. Rep. 94-1558, 94th Cong., 2d Sess. 9 (1976) [hereinafter cited as *House Report*] (fee awards should be sufficient "to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys").

In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), and *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), this Court adopted a basic formula for computing an attorneys' fee award. The initial step is to calculate what has been termed the "lodestar" figure [4] by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433.[5] That figure "is presumed to be the reasonable fee contemplated by § 1988." *Blum*, slip op. 10. The lodestar may then be adjusted in either direction based chiefly upon the court's assessment of the degree of success the plaintiff obtained. *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), slip op. 13-22; *Blum*, slip op. 10-14; *Hensley*, 461 U.S. at 437. Because "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also the relation-

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[4] See, *e.g.*, *Lynch* v. *City of Milwaukee*, 747 F.2d 423, 426 n.1 (7th Cir. 1984); *Copeland* v. *Marshall*, 641 F.2d 880, 890-891 (D.C. Cir. 1980) (en banc).

[5] The Senate and House Reports refer to the factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as matters to be considered in computing a fee award (see *Senate Report* 6; *House Report* 8), but most of these considerations will be subsumed within the calculation of the lodestar. *Hensley*, 461 U.S. at 433-434 & n.9.

ship between the claims on which effort was expended and the ultimate relief obtained" (*Smith*, slip op. 13), "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained" (*Hensley*, 461 U.S. at 440). On the other hand, "an enhanced award may be justified 'in some cases of exceptional success' " (*Blum*, slip op. 10), because the basic standard of reasonable rates multiplied by reasonably expended hours may result in a fee that is " 'unreasonably low' " (*ibid.* (citation omitted)).

A variety of factors are material to the second step of the analysis required by *Hensley*, but not every factor is relevant in every case. The dollar amount of a plaintiff's damages award may provide a good benchmark in a case resulting solely in an award of damages, but will obviously provide no assistance where the only relief awarded was a declaratory judgment or an injunction. By the same token, the entry of an injunction may be independently significant even in cases where damages are awarded, given the stringent criteria that a plaintiff must satisfy to obtain injunctive relief (see, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983)). (Of course, the absence of an injunction is significant as well, because it demonstrates that the violations found by the court or the jury are unlikely to recur.)[6] And even where damages are the sole relief the plaintiff obtains, there may be other circumstances, not reflected in the damages award, demonstrating that the case involved far

[6] However, whether an injunction has been entered should not be the sole criterion for measuring the reasonableness of the lodestar, even where injunctive relief can be obtained, since that would needlessly encourage the parties to seek such relief, thereby adding unnecessarily to the litigation.

more than the resolution of individual grievances against isolated instances of unlawful behavior by state or local officials. For example, a nominal damages award may bring a halt to an unconstitutional policy or custom that was previously endorsed by the defendant and thereby vindicate the rights of the public at large as well as the specific plaintiff (see *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691-692, 694 (1978)); in such a case, an award of attorneys' fees greater than nominal damages might be necessary to ensure that the plaintiff could obtain counsel. In short, the inquiry should take into account whether the relief awarded to the plaintiff vindicated simply his own injuries or rectified a broader or persistent pattern or practice of misconduct that would perforce benefit the public as well.

2. This case does not involve a challenge to the conditions of confinement in a state prison, segregated conditions of a school system, or a pattern and practice of police misconduct; nor does this suit involve a claim for relief for which only nominal damages could be awarded. Rather, respondents sought an award of substantial compensatory and punitive damages and injunctive relief based on a variety of constitutional and common law tort theories. However, respondents did not pursue their claim for injunctive relief, and the only relief that respondents received was a damages award, the bulk of which was based on their state law torts, not their constitutional claims. No injunction was entered against any of the defendants,[7] and nothing in the lower courts' opinions sug-

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[7] Although the district court stated at a hearing that it would have granted an injunction against some of the defendants had respondents asked for one (J.A. 219), the court made no findings of the type necessary to support injunctive

gests that the judgment caused the City or its police force to restructure its operations in any manner that would benefit the public in general. In sum, it is fair to say—without in any sense denigrating the importance of the litigation—that this case involved a tort suit brought essentially for the monetary benefit of the individual plaintiffs whose rights were violated.

Nevertheless, the lower courts concluded that an attorneys' fee award of $245,456.25 was "reasonable" even though 17 of 32 defendants were dismissed prior to trial, nine of the remaining individual defendants were found not liable at trial, respondents obtained no relief beyond an award of damages, the total award of damages was only $33,350, and only $13,300 of that award (40% of the total) was attributable to respondents' civil rights claims. The fee award was therefore more than seven times greater than the total award of damages and more than 18 times greater than that portion of the damages award attributable to the civil rights claims for which Congress authorized the courts to award attorneys' fees.

That result cannot be squared with any conceivable notion of a "reasonable" attorneys' fee. Assuming arguendo that the district court's findings were sufficient under *Hensley* for the purpose of deciding whether all of the hours claimed by respondents' counsel in this case were "reasonable" (an assumption

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relief. See *City of Los Angeles* v. *Lyons, supra; O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Moreover, although the City was found liable under 42 U.S.C. 1983, the district court—which entered its judgment prior to this Court's decision in *City of Oklahoma City* v. *Tuttle*, No. 83-1919 (June 3, 1985)—did not find that respondents had proven that a City "custom" or "policy" was unlawful.

that we are unwilling to accept, but that we will not contest here), that court's reliance upon a general hourly rate for the legal services provided by for-profit counsel produced the extraordinary result that respondents' counsel received a fee award seven times greater than respondents' total damages award.[8] It goes without saying that few reasonable plaintiffs would be willing to pay their attorneys more than they hope to recover in damages in a case of this type and that any approach to the computation of a fee award that fails to consider this factor does not adequately represent the actual workings of the private market for legal services. See *Jaquette* v. *Black Hawk County*, 710 F.2d 455, 460 (8th Cir. 1983) ("common sense dictates that in a property damage suit few clients would find it reasonable to expend $100,000 to achieve a recovery of money damages not to exceed $1,500").[9]

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[8] The court of appeals also is not blameless in this regard. That court engaged in a perfunctory review of the district court's rather conclusory analysis in the teeth of some quite substantial arguments that the district court altogether abnegated its responsibilities not only under *Hensley* but also under this Court's remand order. (For instance, it is implausible that all the 45.5 hours of "stand-by" time spent by one of respondents' counsel awaiting the jury's verdict was "reasonable," especially since respondent's other counsel, who was on the faculty at a Los Angeles area law school (J.A. 119), seems to have been at hand.). Other courts of appeals have not hesitated to reduce excessive fees. See, *e.g.*, *Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945 (1st Cir. 1984). The court of appeals should have done the same here.

[9] Most of the courts of appeals have ruled that the size of the underlying money judgment is a relevant consideration in computing a fee award. See *Nephew* v. *City of Aurora*, 766 F.2d 1464, 1466-1467 (10th Cir. 1985); *Lynch* v. *City of*

The same point can be made in a different way. If Congress had adopted a statute forbidding lawyers from charging more than a "reasonable" fee for their services in civil rights cases (cf. 28 U.S.C. 2678; 42 U.S.C. 406(b)(1)), certainly few persons (and very few plaintiffs) would maintain that a fee seven times greater than a plaintiff's tort recovery was "reasonable." But there should be no difference between that situation and this one, because 42 U.S.C. 1988 only shifts the burden of paying attorneys' fees from a successful plaintiff to an unsuccessful defendant and does not modify the definition of a "reasonable" fee based simply on the identity of the party who must pay it. A disproportionate fee is no less unreasonable simply because the losing party must foot the bill.

Indeed, the disproportionate award of attorneys' fees in this case is directly contrary to Congress's belief that plaintiffs' attorneys would not be the primary beneficiaries of Section 1988. In the words of Senator Tunney, the initial sponsor of the bill (S. 2278, 94th Cong., 2d Sess. (1976)) that ultimately became 42 U.S.C. 1988, "[i]f any relief is accorded by the passage of this bill, it will be granted to those

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Milwaukee, 747 F.2d at 428 n.5; *Wojtkowski* v. *Cade*, 725 F.2d 127, 131 (1st Cir. 1984); *Jaquette* v. *Black Hawk County*, 710 F.2d at 459-461; *Bonner* v. *Coughlin*, 657 F.2d 931, 934-935 (7th Cir. 1981); *Perez* v. *University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt* v. *Abel*, 585 F.2d 613, 618 (4th Cir. 1978); see also *Scott* v. *Bradley*, 455 F. Supp. 672, 675 (E.D. Va. 1978). But see *Di Filippo* v. *Morizio*, 759 F.2d 231 (2d Cir. 1985); *Cunningham* v. *City of McKeesport*, 753 F.2d 262 (3d Cir. 1985), petition for cert. pending, No. 84-1793. In *Nephew*, the Tenth Circuit distinguished (as dictum) and disapproved language in an earlier decision—*Ramos* v. *Lamm*, 713 F.2d 546, 557 (10th Cir. 1983)—that had taken a contrary view. See 766 F.2d at 1465-1466.

individuals who have been unlawfully deprived of their constitutional rights." 122 Cong. Rec. 32185 (1976).[10] Representative Drinan, a principal sponsor

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[10] The congressional hearings laying the groundwork for the civil rights attorneys' fee bill must have left Congress with the impression that the fee measure to be drafted would not create a favored class of civil rights litigators. As one witness explained (*Awarding of Attorney's Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 227 (1975) [hereinafter cited as *House Hearings*] (testimony of Philip J. Mause)):

> I do not think I have seen anyone writing in this area who contemplates the situation in which Covington & Burling simply sends its bill to the losing party in a case in which its client won. I think the judge would have to retain some discretion to determine the degree to which the fees were reasonable.

See also *The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 949-1024 (1973) [hereinafter cited as *Senate Hearings*] (Mary Frances Derfner, Lawyer's Committee for Civil Rights Under law) (digest of decisions in civil rights cases in which the courts, prior to *Alyeska*, awarded, discussed, or denied attorneys' fees). This digest of cases reveals that, as of 1973, the typical attorneys' fee award in civil rights cases was in the range of $350 to $5,000. Only four out of the 30 fee examples provided were higher than that amount. Significantly, in two of the cases cited, the courts refused to award the fee amounts requested by counsel because awards of that magnitude would have been disproportionate to the damages obtained as a result of the litigation (*id.* at 953, 967-968). See *Brown* v. *Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971); *Lyle* v. *Teresi*, 327 F. Supp. 683, 686 (D. Minn. 1971). Although these hearings preceded the Court's decision in *Alyeska*, they are cited in the Senate Report as a basis for adopting the bill that became 42 U.S.C. 1988. See *Senate Report* 2.

of the bill in the House (*Maine* v. *Thiboutot*, 448 U.S. 1, 9-10 (1980)), made the same point, stating that the "bill is not intended * * * to allow lawyers * * * to recover unjustly from a defendant." 122 Cong. Rec. 35124 (1976). In fact, a prominent concern that surfaced during the floor debate over the bill was that it would prove to be something of a "Civil Rights Attorneys Relief Act" that would "guarantee large fees to attorneys." *Id.* at 31850 (Sen. Allen); see, *e.g.*, *id.* at 32394 (Sen. Helms); see also *id.* at 35117 (Rep. Hyde). However, Senator Kennedy, a chief sponsor and the Senate floor manager of the bill, sought to lay such concerns to rest by explaining that "[w]e are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens * * *. And the determination of fees is left, in any event, to the discretion of the courts" (*id.* at 31851).[11] It is therefore plain that Congress intended that the goal of avoiding "windfalls for attorneys" (*Senate Report* 6; *House Report* 9) would play as prominent a role in the calculation of a fee award as the goal of encouraging plaintiffs to bring meritorious civil rights suits.

3. The explanation for the startling award to respondents' counsel is that the lower courts misconstrued the guidelines for computing a reasonable at-

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[11] See also *id.* at 33314 (Sen. Kennedy) (the act is not "a relief fund for lawyers"; "this bill is not for the purpose of aiding lawyers"); *id.* at 32185 (Sen. Tunney) (the bill was not intended to "grant[] relief to attorneys"; no "single case of a lawyer getting rich on civil rights cases"); *id.* at 35127 (Rep. Jordan) ("[t]his is not a bill that we could term a food-stamp bill for lawyers"; "[i]t is not going to work that way").

torneys' fee established by this Court in *Hensley* and *Blum*. Although both decisions emphasized that the lodestar should produce a presumptively reasonable attorneys' fee, the Court nevertheless recognized that this would not always be the case and that the lodestar might have to be adjusted to ensure that a particular fee award was proper. See *Hensley*, 461 U.S. at 434-440; *Blum*, slip op. 9-10. In computing the fee award in this case, the district court erred by failing to complete this step in the process. Where, as here, a judgment consists solely of compensatory and punitive damages, we submit that any lodestar figure that approximates or exceeds the amount of those damages is presumptively *unreasonable* and must be closely scrutinized by the courts.

In this case, the district court found that the requested rate of $125 per hour for every hour spent by respondents' counsel was reasonable (J.A. 190), even though the resulting fee was wildly disproportionate to the damages that respondents obtained. In awarding respondents' counsel $245,456.25 for receiving a $33,350 judgment, the district court ignored or overlooked the salient fact that no attorney would ever bill his client in that manner. Moreover, and more important, the court's mindless adherence to the lodestar approach gave no consideration to the fact that the generally prevailing contingent fee schedule in the relevant legal community might well provide a more appropriate standard for determining a "reasonable" fee award for respondents' counsel in these circumstances. The failure to undertake this inquiry, in our view, was inconsistent with the Court's ruling in *Blum* that a court must examine the fee schedule established in the relevant legal community for "similar services" (*Blum*, slip op. 8 n.11).

B. The Prevailing Contingent Fee Rate For Personal Injury Suits May Often Provide The Best Means Of Computing A Reasonable Fee For Claims Resulting Solely In Monetary Damages

1. In *Blum* v. *Stenson, supra*, the Court addressed the issue of how the appropriate dollar amount of attorneys' fee awards under 42 U.S.C. 1988 should be calculated. The precise question before the Court was whether use of the prevailing market rates charged by for-profit attorneys to compute a fee award would lead to exorbitant fees and provide windfalls for attorneys employed by nonprofit legal aid organizations. Because such organizations incur lower operating expenses and, by definition, do not charge their clients a fee that includes an element of profit for the attorneys handling their litigation, it was argued that a cost-based approach was the only means of ensuring that legal aid attorneys would be adequately compensated for their efforts but would not receive a windfall at a defendant's expense. See *Blum*, slip op. 5 & n.6. However, after examining the legislative history of the Act, the Court ruled that Congress intended the courts to refer to the prevailing market rate in the relevant legal community regardless of whether a prevailing plaintiff was represented by private counsel or by a nonprofit legal services organization. Slip op. 5-8.

In so ruling, the Court recognized that determining an appropriate market rate for legal services was inherently difficult, given the diversity in the services offered by lawyers, their different experience, skills, and reputation, and the fact that an ex post calculation of a reasonable fee was an inexact means of resolving a matter that a lawyer normally negotiates with his client before representation is undertaken. *Blum*, slip op. 8 n.11. However, the Court found that

the inquiry was not altogether unmanageable because "the rates charged in private representations may afford relevant comparisons" (*ibid.*). The Court also endorsed a standard requiring a prevailing party to demonstrate that the sought-after rates "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," which the Court, "for convenience," termed "the prevailing market rate." *Ibid.* That standard, the Court assumed, was consistent with Congress's intent that attorneys' fee award would allow plaintiffs with meritorious claims to retain competent counsel, but would not unfairly enrich plaintiffs' attorneys at an unsuccessful defendant's expense. See *id.* at 6, quoting *Senate Report* 6.

Application of that standard in any given case can be a complex undertaking where counsel lacks an historic billing rate.[12] That complexity, *Blum* noted, stems largely from the lack of a generally prevailing market rate for legal services and the differences among attorneys in factors such as skill and experience. However, the difficulty in computing the appropriate "market rate" may be tempered in some instances where there is a separate "market" in the private bar that can serve as a rough approximation to the type of case at hand. In some instances, employment discrimination cases for example, the for-profit bar may also litigate such cases and may have generally prevailing rates that can be used as the basis for calculating a reasonable attorneys' fee under the Act. In other cases, such as a school desegregation lawsuit, there may be no precise parallel in the market.

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[12] See *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 16-17 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985).

Given the diversity of claims that may be brought under the statutes for which Section 1988 authorizes a fee award, especially 42 U.S.C. 1983, the determination of what types of legal services are necessary to represent a particular plaintiff, and thus what types of private legal services are "similar," may vary according to particular issues presented by the case. The different types of legal services rendered by lawyers may therefore lead to varying results in the calculation of the "prevailing market rate" depending on the relevant market used. By requiring the courts to look to the prevailing market rates for "similar services," however, *Blum* recognized that balancing the goals of ensuring adequate representation for civil rights plaintiffs, but not providing overcompensation for their counsel, should take these differences into account to the extent feasible.

2. a. Properly viewed, this case presents few of the complications that can potentially arise in the calculation of the prevailing market rate for comparable legal services, because this case allows that determination, and an appropriate downward adjustment, to be made without undue difficulty.

The material facts are simple and straightforward. As noted above, respondents sought and obtained a damages award for their constitutional and pendent state law torts, but they obtained no broader form of relief. In these circumstances, the appropriate market rate for the "similar services" provided by for-profit attorneys (*Blum*, slip op. 8 n.11) would be the contingent fee rate that is used in the relevant legal community for personal injury suits.[13] Given the

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[13] We use the term "contingent fee" rate in its commonly-understood sense that typically describes the arrangement in

nature of the claims respondents presented, the "personal injury bar" provides the relevant submarket for this case because it provides services "similar" to those involved here. The generally applicable contingent fee rate used by attorneys who represent similar plaintiffs in comparable types of litigation should then accurately reflect the appropriate market rate for the legal services provided to respondents.[14] Indeed, had respondents pursued only their state law tort claims, a lawyer is likely to have used precisely this rate to charge respondents for representing them.

The fact that respondents presented constitutional claims in addition to their state law tort claims does not call for a radically different conclusion. It is well settled that Section 1983 "creates a species of tort liability" (*Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)), and that "[Section] 1983 claims are best characterized as personal injury actions" (*Wilson* v. *Garcia*, No. 83-2146 (Apr. 17, 1985)). Moreover, the purpose of an award under Section 1983 is "to compensate persons for injuries that are caused by the deprivation of [their] constitutional rights" (*Carey* v. *Piphus*, 435 U.S. 247, 254 (1978)), which

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"plaintiffs' tort representation." *Copeland*, 641 F.2d at 893. The term "contingency" has also been used to refer to adjustments to the lodestar to compensate for the possibility at the outset of litigation that the plaintiff will be unsuccessful. Whether such multipliers are permissible is the issue before the Court in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, cert. granted, No. 85-5 (Oct. 7, 1985).

[14] The contingent fee award would be computed on the basis of both the compensatory and punitive damages obtained by respondents. By including the punitive damages award as part of the basis, the contingent fee rate should more than adequately compensate respondents' counsel.

is precisely the purpose served by a common law damages award (*id.* at 254-255 (" '[t]he cardinal principal of damages in Anglo-American law is that of *compensation* for the injury caused to [the] plaintiff by defendant's breach of duty"), quoting 2 F. Harper & F. James, *The Law of Torts* § 25.1, at 1299 (1956) (emphasis in original)). As the Court explained in *Carey*, "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." 435 U.S. at 254. Accordingly, since the "purpose" served by the Fourth Amendment—to protect against the arbitrary invasion of one's liberty and property (see, *e.g.*, *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 5)—"protect[s] persons from injuries" to essentially the same type of "interests" as do the various state law torts that respondents' also alleged in their complaint, there is every reason to treat respondents' constitutional tort claims in the same manner as their analogous state law claims. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 408-409 (1971) (Harlan, J., concurring in the judgment).[15]

b. This approach is consistent with the purposes underlying 42 U.S.C. 1988. Congress adopted the act to "encourage[] plaintiffs to bring meritorious civil rights suits." *Marek* v. *Chesny*, slip op. 9. The prospect of recovering $11,000 for representing plaintiffs in a damages suit (assuming a contingency rate

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[15] In this case, it is no answer that a contingent fee approach should not be considered because "the rights involved may be non-pecuniary in nature" (*Senate Report* 6; see Br. in Opp. 22), since the rights involved in this case can be represented in pecuniary terms, as the verdicts show.

of 33%) is likely to attract a substantial number of attorneys. At the same time, it is not inconsistent with Congress's intent to allow the private bar in a case such as this one to make the estimate whether plaintiffs' claims are "meritorious," because that is precisely the function that lawyers serve in the marketplace.

Moreover, there is no indication that Congress intended that civil rights plaintiffs should have a completely risk-free opportunity to litigate their claims. On the contrary, Section 1988 retained the historic requirement that a plaintiff establish that he is a prevailing party to recover any fee award at all. See *Senate Report* 1, 5; *House Report* 6-8; *Hensley*, 461 U.S. at 433; *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980); see generally *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 684-685 (1983).[16] In addition, a plaintiff who makes this showing has merely crossed "the statutory threshold" (*Hensley*, 461 U.S. at 433) and must also demonstrate that his fee request is "reasonable." The two-step process adopted by the Court in *Hensley* for computing a presumptively reasonable fee emphasizes the extent to which the plaintiff has

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[16] Accord 122 Cong. Rec. 33314 (1976) (Sen. Kennedy) (lawyer's "fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears"); *House Hearings* 8 (Rep. Sieberling) (the bill "certainly is not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit"); *id.* at 166-167 (testimony of Peter A. Schuck, Consumers Union) (the bill "does not subsidize public interest groups. It does not give them generalized support for activities, some of which Congress may support and some of which Congress may not. But, as I say, it targets it [attorney's fees] to a particular objective, upon which Congress has spoken").

been successful. See *Smith* v. *Robinson*, slip op. 13-22; *Blum*, slip op. 10-14; *Hensley*, 461 U.S. at 434-440.[17] This is so, *Hensley* explained, even where "the plaintiff's [unsuccessful] claims were interrelated, nonfrivolous, and raised in good faith," because "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill" (*id.* at 436). The "most critical factor" in determining a reasonable fee is always "the degree of success obtained." *Ibid;* cf. *Marek* v. *Chesny*, slip op. 8 (requiring civil rights plaintiffs "to 'think very hard' about whether continued litigation is worthwhile" by applying Fed. R. Civ. P. 68 is not inconsistent with Section 1988, given the Act's emphasis on the degree of success obtained).

Relying on the prevailing contingent fee rate, where the lodestar produces a fee disproportionate to the results obtained, also ensures that attorneys who represent civil rights plaintiffs will not be more handsomely compensated than attorneys who represent other types of civil litigants, which Congress did not intend. The standards Congress identified as a guide for computing a reasonable fee make that point. For instance, Congress referred the courts to the 12 factors discussed in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), that were

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[17] As Justice Rehnquist noted in granting a stay of the mandate in this case (No. A-122, slip op. 5), it is significant that the House Report, in citing the *Johnson* factors for guidance in determining a "reasonable" fee, chose to highlight a key consideration under this eighth factor—"'*the amount received in damages, if any.*'" No. A-122, slip op. 5 (quoting *House Report* 8 (emphasis in opinion)). *Hensley* also repeatedly underscored the importance of the extent of a plaintiff's success in determining a reasonable attorney's fee. See 461 U.S. at 434-440.

derived from the provisions of the American Bar Association's Code of Professional Responsibility governing the determination of a permissible fee for retained counsel. See *House Report* 8; *Senate Report* 6; *Hensley*, 461 U.S. at 429-430 & n.3.[18] Congress also cited three district court decisions said to "correctly appl[y]" the *Johnson* standards in fixing a fee award (*Senate Report* 6), and each case calculated a few award by reference to the prevailing market rate for legal services. See *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975).

This Court's decision in *Hensley* also emphasized that the "billing judgment" traditionally exercised by counsel in private practice cannot be dispensed with under Section 1988 merely because the opposing party must foot the bill. See 461 U.S. at 434, 437; *id.* at 441 (Burger, C.J., concurring) (in private practice, the client who is presented with a bill by his own attorney ordinarily has reason for "confidence that his lawyer has exercised the appropriate 'billing judg-

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[18] Those factors are as follows (488 F.2d at 717-719; see also *Hensley*, 461 U.S. at 430 n.3):

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

ment' "). On the contrary, any time that is "excessive, redundant, or otherwise unnecessary" or that, in general, fails to reflect " 'billing judgment,' " must be excluded since " '[h]ours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' " 461 U.S. at 434, quoting *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original). In sum, the standards and billing practices that for-profit attorneys in the market would use should be considered in calculating a reasonable fee award under the Act.

Under the district court's approach, by contrast, the concerns expressed by some legislators in opposition to passage of Section 1988 would have been well-founded. Despite the repeated assurances of the bill's chief sponsors that Section 1988 was designed to benefit persons with meritorious civil rights claims and not to enrich their counsel, the Act would overcompensate attorneys who handle fee cases and, in some instances, allow attorneys to collect fees that bear little or no relation to the actual worth of the services performed for their clients. No "billing judgment" would have to be exercised by such attorneys, because they would be compensated for all of their time spent on a case in which their clients achieved some measure of success, even if the time they devoted to the case was wholly out of proportion to the results obtained on their client's behalf. Congress plainly did not intend that Section 1988 would operate in this fashion, and this Court has already made clear that the Act should not be permitted to serve as a vehicle for the award of excessive fees. *Hensley*, 461 U.S. at 440.

c. It is also important to note that any damages recovery stemming solely from state law tort claims

should not be included in this determination. Congress authorized the courts to award attorneys' fees only in "any action or proceeding to enforce a provision of" specified federal laws. Section 1988 does not provide that fees may be awarded on the basis of pendent state law claims, and its legislative history does not suggest that Congress sought to require defendants to underwrite the litigation of their adversaries' state law tort claims by awarding attorneys' fees for the time, expenses, or risks associated with such claims. Therefore, including a plaintiff's damages recovery for state law torts would artificially inflate a fee award in a manner Congress did not intend.

3. To summarize, although the lodestar should presumptively constitute a reasonable fee, there will be cases in which this is not true, and some adjustment must be made. Specifically, where the lodestar exceeds or approximates the damages recovered by a plaintiff in a case resulting solely in that form of relief, the lodestar produces an unreasonable fee and should be reduced. In modifying such an award in light of the results obtained, a court should consider the prevailing contingent fee rate in the relevant legal community, which, in a case seeking relief for constitutional and common law torts, should provide an appropriate guidepost for computing the market value of the services provided by plaintiffs' counsel.

Nothing in the opinions below discloses any circumstance that would justify a deviation from that approach here. At the outset of this litigation, respondents sought broad declaratory and injunctive relief, as well as damages, against the City, its chief of police and 30 police officers for civil rights violations and common law torts. After four years of litigation, respondents achieved only a damages judgment

against the City and five of its police officers in the amount of $33,350—the bulk of which ($20,050) was awarded to redress their state common law claims, not their civil rights claims ($13,300). Nothing in the opinions below indicates that respondents' victory constitutes anything more significant than it appears to be on the surface, *i.e.*, a monetary judgment against the City and five low-level officers for injuries sustained in a single incident. As Justice Rehnquist noted (No. A-122, slip op. 2), "no restraining orders or injunctions were ever issued against any of the defendants, and the City of Riverside was not compelled to, and did not, change any of its practices or polices as a result of the suit." Accordingly, in fixing a reasonable attorneys' fee in light of respondents' damages recovery, there is no reason not to apply the contingent fee rate in this case.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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